IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

CONSTELLATION TECHNOLOGIES LLC, *Plaintiff* vs. TIME WARNER CABLE INC. and TIME WARNER CABLE ENTERPRISES LLC, *Defendants*	Civil Action No. 2:13-CV-1079-JRG **LEAD CASE** **JURY TRIAL DEMANDED**
CONSTELLATION TECHNOLOGIES LLC, *Plaintiff* vs. WINDSTREAM HOLDINGS, INC., WINDSTREAM CORPORATION, and WINDSTREAM COMMUNICATIONS, INC., *Defendants*	Civil Action No. 2:13-CV-1080-JRG **JURY TRIAL DEMANDED**

CONSTELLATION'S CONSOLIDATED SUR-REPLY TO DEFENDANTS' MOTIONS TO TRANSFER VENUE

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INTRODUCTION

Defendants' reply briefs simply repeat their arguments that (i) although not a single relevant document or witness resides in Delaware, its supposedly central location for certain far-flung witnesses and non-parties nevertheless mandates transfer to that district, despite the many party and non-party witnesses and documents that inarguably reside here in EDTX, and (ii) the *second-filed* declaratory judgment claims that Defendants' partners filed in Delaware can somehow strip this Court of authority to hear Constellation's *first-filed* litigations against the defendants regarding infringing activity that occurs throughout EDTX but not at all in Delaware.

Both arguments fail as a matter of law. First, even if every party and non-party witness that Defendants have identified, all of whom reside outside of Delaware, were relevant to this action (a fact Defendants have failed to demonstrate), the law prohibits transferring from a venue that houses multiple party and non-party witnesses and documents, and harbors extensive infringing activity, to one that has absolutely zero such connections. Second, the Federal Circuit recently confirmed that the tactic that the Defendants' partners have employed—initiating *second-filed* actions in a separate district in order to strip venue from the court where the *first-filed* action was brought—is wholly improper.

Defendants also argue that this case belongs in Delaware because Rockstar and Nortel are non-parties to this suit and therefore their longstanding connections to East Texas are not chargeable to Constellation. This is a *non sequitur*. Rockstar's and Nortel's long presence in Eastern Texas means that many witnesses and documents reside in this district. Treating these witnesses as non-parties only strengthens this district's convenience because it confirms that key ***non-parties*** are subject to this Court's subpoena power. Delaware provides no such demonstrable advantages for any relevant non-party.

The Court should deny Defendants' motion to transfer this lawsuit from the venue with the greatest demonstrable connections, and the most extensive subpoena power over the largest number of witness, to a remote venue that has no such qualities and whose strongest connection is a series of pretextual and improper declaratory judgment claims designed to manipulate venue.

I. Multiple Relevant Witnesses Are In This District And None Are In Delaware.

Defendants do not dispute that their infringing activity occurs throughout this district, and never in Delaware, and that material witnesses reside in this district, while none reside in Delaware. For example, they do not seriously dispute the relevance of non-party witnesses Art Fisher and Rich Weiss, both former Nortel employees residing in the Dallas area with knowledge regarding Nortel's patent licensing practices and policies. Nor do they seriously dispute that non-party patent prosecuting attorney Wei Wei Jeang has relevant information and is based in Dallas. Nor do Defendants deny that Rockstar employees, including Don Powers, Bernie Tiegerman, and Alfi Guindi have relevant knowledge and are present in this district.

Instead, Defendants' response to Constellation's roster of relevant witnesses is an assertion that "witnesses . . . located in Texas do not outweigh the substantially greater convenience, for the majority of witnesses and evidence, of the District of Delaware." TWC Reply p. 1; *see also* Windstream Reply pp. 4–5. Defendants are wrong.

The Federal Circuit has confirmed that "[i]n cases where no potential witnesses are residents of the court's state, favoring the court's location as central to all of the witnesses is improper." *Uniloc USA, Inc. v. Distinctive Dev. Ltd.*, 964 F. Supp. 2d 638, 650 (E.D. Tex. 2013) (Davis, J.) (citing *In re Genentech, Inc.*, 566 F.3d 1338, 1344 (Fed. Cir. 2009)). The *Genentech* decision ordered a case removed from this district when the "district court improperly used its central location as a consideration in the absence of witnesses within the plaintiff's choice of venue." *Genentech*, 566 F.3d at 1344. This district has long followed that precedent.[1]

While Windstream ignores the Federal Circuit's precedent, TWC attempts to distinguish *Genentech* based on the particular locations of the witnesses at issue in that case. The *Genentech* holding, however, was based not on the particular de-centralized places where the witnesses resided but instead on the conclusion that cartography and a drafting compass were not sufficient to assign venue to a district that houses absolutely no witnesses—"it is improper to consider the centralized location of [a district under analysis] when no identified witness resides in the district." *In re Nintendo Co.*, 589 F.3d 1194, 1199 (Fed. Cir. 2009) (summarizing *Genentech*'s holding and ordering case transferred out of EDTX when "the trial court hypothesized that the Eastern District of Texas could serve as a centralized location"). Given that a defendant has the burden to show that a proposed transferee venue is "clearly more convenient" than plaintiff's chosen venue,[2] it would be an even greater error to transfer a case *out* of a district that houses witnesses and into one that is allegedly "centralized," but houses none.

Defendants also attempt to resuscitate their argument that ARRIS's facility in Horsham, Pennsylvania is somehow relevant because it is "one of the very, very key facilities for Arris." TWC Reply p. 3 (emphasis added). But Defendants have not alleged, let alone demonstrated, that the facility is key to them, that they use any equipment manufactured or designed at this ARRIS Horsham facility, or that, even if they do, that particular *equipment* is actually used to

[1] *See, e.g.*, *MobileMedia Ideas LLC v. HTC Corp.*, No. 2:10-CV-112, 2012 WL 1570136, at *7 (E.D. Tex. May 3, 2012) (Gilstrap, J.) ("[W]here no potential witnesses are residents of the court's state, favoring the court's location as central to all of the witnesses is improper."); *Novartis Vaccines & Diagnostics, Inc. v. Bayer HealthCare LLC*, No. 2:08-CV-068, 2009 WL 3157455, at *1 (E.D. Tex. Sept. 28, 2009) (Ward, J.) ("[A] trial court should not consider its central location . . . in the absence of witnesses within the plaintiff's choice of venue.") (omission in original, internal quotation marks omitted).

[2] *See Genentech*, 566 F.3d at 1342.

provide any of the *services* that Constellation has accused here.[3]

Defendants also ignore the relevant party and non-party witnesses, including many named inventors on the asserted patents, who have affirmed that EDTX is substantially more convenient than Delaware, and that they would be willing to appear in EDTX.[4] In contrast not a single witness has said they are willing to travel to Delaware. This weighs against transfer. *See ContentGaurd Holdings, Inc. v. Google, Inc.*, No. 2:14-CV-00061, Slip Op. pp. 9, 10 (E.D. Tex. Apr. 15, 2014) (Gilstrap, J.) (relevant witnesses declaring their willingness to travel to Texas, but not the proposed transferee venue, counseled against transfer and diminished the weight accorded to witnesses actually present in the transferee venue) (citing *In re Affymetrix, Inc.*, 2010 WL 1525010, at *2 (Fed. Cir. Apr. 13, 2010)).

There are a many relevant witnesses and documents in and near this district. *See* Dkt. No. 39 pp. 2–4, 10–17. There many more witnesses who have committed to appearing in EDTX and have explained in detail why it is more convenient. Defendants have failed to identify a single witness in Delaware.

II. The Second-Filed Delaware Lawsuits Are Irrelevant To The Transfer Analysis.

Defendants claim that Cisco and ARRIS brought their second-filed declaratory judgment claims in Delaware because they are suppliers of TWC and Windstream, and on this basis the current EDTX lawsuits should be transferred. TWC Reply p. 1; Windstream Reply pp. 1–2. But the Federal Circuit has concluded that a supplier's second-filed lawsuit does not control the forum for a dispute.

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[3] If the Court finds Defendants' hazy allegations of any relevance, Constellation requests venue discovery to determine whether they in fact have any merit. *Voxpath RS, LLC v. LG Elecs. U.S.A., Inc.*, No. 2:10-CV-160, 2012 WL 194370 (E.D. Tex. Jan. 23, 2012) (Gilstrap, J.) (ruling on transfer motion after permitting limited venue-related discovery).

[4] *See, e.g.*, Dkt. Nos. 39-1 (Powers Decl.) ¶¶ 24–28, 39-2 (Garland Decl.) ¶¶ 4–5 , 39-4 (Veshi Decl.) ¶ 2, 39-5 (McColgoan Decl.) ¶ 3, 39-6 (Tigerman Decl.) ¶ 4, 39-7 (Guindi Decl.) ¶ 3, 39-8 (Lee Decl.) ¶¶ 8–9, 39-9 (Josephson Decl.) ¶ 8, 39-10 (Anderson Decl.) ¶ 9, 39-11 (Mann Decl.) ¶¶ 12–13, 39-12 (Pfeffer Decl.) ¶¶ 9–13, 39-13 (Grant Decl.) ¶¶ 8-12, 39-14 (Felske Decl.) ¶¶ 7-13.

In *Microsoft Corporation v. DataTern, Inc.*, Case No. 2013-1184, 2014 WL 1327923 (Fed. Cir. April 4, 2014), the patentee, DataTern, had first sued Microsoft's customers for patent infringement in EDTX. *Id.* at *1, 3. Mirroring the tactics employed by Cisco and ARRIS, Microsoft then sued DataTern in a different district, the Southern District of New York, for declaratory judgment regarding the very same patents. *Id.* In an attempt to support jurisdiction, Microsoft pointed to indemnification requests that it had received from the customers that DataTern had first sued in EDTX. *Id.* at *3. When DataTern moved to dismiss for lack of jurisdiction, Microsoft "respond[ed] that jurisdiction exists because DataTern's infringement claims against their customers are 'based on' the customers' use of Appellees' products and thus impliedly assert indirect infringement against [Microsoft]." *Id.* at *2. The Federal Circuit held that Microsoft's conduct was totally improper:

> Importantly, even if there were such an obligation—to indemnify a customer already sued by the patentee in Texas—it would not justify what Appellees seek here. A case has already been filed against the customers in the Eastern District of Texas. Appellees cannot seek a declaration from a New York court on behalf of customers they must indemnify where a suit against these very same customers on all the same issues was *already* underway in a Texas court. By agreeing to indemnify any one of their customers, Microsoft could defend its customers and efficiently and effectively participate *in the Texas action*. *Id.* at *3 (internal citation omitted).

Constellation has moved to dismiss the second-filed Delaware actions on multiple grounds. *See* Dkt. No. 39, Exs. D–F. Defendants do not even attempt to argue that the "Delaware Strategy" that TWC's counsel orchestrated will survive intact. To the contrary, their Delaware partners have requested repeated extensions of time to avoid responding to the motions to dismiss while this transfer motion is pending.[5]

Beyond the pending motions to dismiss, the Federal Circuit's recent teaching in *DataTern* is not ambiguous. As explained in Constellation's opposition brief, Cisco and ARRIS filed suit in Delaware because their customers, TWC and Windstream, were sued in Texas. *See* Dkt. No. 39 pp. 5–6. The Cable Company Partners filed suit in Delaware because TWC was sued in Texas and the Partners believe that their systems are the same as TWC's. *See* Dkt. No. 39 pp. 4–5, Ex. A at ¶¶ 67–68.[6] If the Delaware parties believe that they have a proper interest in the Texas cases, they can and should appear here, convince the Court of this fact, and then "efficiently and effectively participate in the Texas action." *Datatern*, 2014 WL 1327923, at *3.

What is clear, however, is that the Delaware strategy cannot properly factor into a transfer analysis. The Federal Circuit has explained that "the co-pendency of cases involving the same patent" may only be considered in an analysis under § 1404(a) when they are "apparent at the time the suit was filed." *In re EMC Corp.*, 501 F. App'x 973, 976 (Fed. Cir. 2013). Plainly, a suit is not "apparent" if it does not exist, and Defendants' own authorities confirm this. In the lone EDTX case cited by either Defendant on this point, the court relied on a finding that "*[a]t the time this suit was filed*, there were over thirty related cases pending in this district." *IPVX Patent Holdings, Inc. v. Altigen Commc'ns, Inc.*, No. 6:11-cv-568-LED-JDL, Dkt. No. 127 at 9

[5] *See, e.g., Bockstar Techs. LLC v. Cisco Sys. Inc.*, No. 1:13-CV-02020 (D. Del. Apr. 4, 2014) Dkt. Nos. 22-23 (seeking extensions to oppose that run through 5/13/2014); *Charter Commc'ns v. Rockstar Consortium US LP*, No. 1:14-CV-00055 (D. Del. Apr. 3, 2014) Dkt. Nos. 28–29 (same); *Arris Grp. Inc. v. Constellation Techs. LLC*, No. 1:14-CV-00114 (D. Del. Apr. 3, 2014) Dkt. Nos. 13-14 (same).

[6] TWC again represents that the "the ***only*** single venue in which this patent dispute can be resolved is the District of Delaware." TWC Reply p. 2. That is not accurate as a matter of law or fact. The Delaware plaintiffs could have filed their claims against Constellation in this district, where Constellation is subject to jurisdiction. And therefore under 28 U.S.C. § 1404(a) the claims against Constellation are transferable to EDTEX. Moreover, not one of the Delaware plaintiffs has a facility in Delaware and none of the Cable Company Partners offers services in Delaware. *See* Dkt. No. 39 p. 5, 15-16, Ex. A ¶¶ 15-18.

(E.D. Tex. Feb. 11, 2014) (emphasis added). Likewise, the recent decision cited by TWC transferred a *second-filed* suit to the district where the *first* suit was filed. *Invensense, Inc. v. STMicroelectronics, Inc.*, No. 2:13-CV-00405, 2014 WL 105627, at *1 (E.D. Tex. Jan. 10, 2014) (Gilstrap, J.) (transferring because "the suit appears to be part of a broader patent dispute between these parties that began with a May 2012 suit (the 'original patent suit'").

To the extent that Defendants suggest that Cisco's and ARRIS's lawsuits were "a likely future occurrence" that can drag this Texas case to Delaware after the fact—a standard never suggested or recognized by the Federal Circuit—they are wrong. First, such alleged foreseeability is wholly academic because the Federal Circuit rejected the use of second-filed suits to manipulate venue in *DataTern*. Second, Defendants' assertion that the jurisdictionally infirm declaratory relief claims in Delaware were a "likely future occurrence" lacks merit. Defendants argue that Cisco's suit was foreseeable (i) because a completely separate Rockstar subsidiary, Bockstar Technologies, sued Cisco in Delaware, and (ii) due to "Rockstar's choice to engage in a licensing campaign." Windstream Reply p. 1. First, Bockstar's lawsuit against Cisco involved six Bockstar patents, none of which are or could be asserted by Constellation here, that relate to Cisco's infringing *products*. There is no claim in Delaware that Cisco infringes the Bockstar patents by providing *services* of the sort at issue here—which involve Defendants' specific activities while operating their particular telecommunications networks. And likewise there is no claim in the EDTX that any device, much less any Cisco device, infringes the patents asserted against TWC and Windstream. Nor is there any allegation that the Defendants in EDTX infringe the Bockstar patents. In short, the Cisco Delaware litigation is an entirely separate lawsuit regarding entirely separate patents and accused activity—it was not foreseeable that Cisco would try to game the venue laws by adding declaratory judgment counterclaims against Constellation's patents.

The dispute over the Constellation patents began here in EDTX when Constellation filed suit against Windstream and TWC. When Constellation filed its lawsuits, no cases involving the Constellation Patents were pending anywhere in the world. There is simply no authority for Defendants' novel and troubling proposition that partners of a defendant seeking transfer out of EDTX can file a series of reactive actions to strip venue from the first-filed venue.

III. The Nortel and Rockstar Connections To This District Weigh Against Transfer.

Defendants argue that because Constellation is a recently-formed, wholly-owned subsidiary of Rockstar, and Rockstar is a non-party, Rockstar's connections to the district do not accrue to Constellation. But even if the Court accepts Defendants' position, the logical conclusion of the argument is that transfer is ***not*** appropriate. Under Defendants' analysis, Rockstar employees are non-party witnesses, and the Court's subpoena power is therefore necessary to secure their attendance at trial. As this Court has recognized, "[a] venue that has 'absolute subpoena power for both deposition and trial' is favored over one that does not." *RPost Holdings, Inc. v. StrongMail Sys., Inc.*, No. 2:12-CV-515, 2013 WL 4495119, *3 (E.D. Tex. Aug. 19, 2013) (Gilstrap, J.). Therefore, either Rockstar's presence in EDTX is chargeable to Constellation, weighing against transfer, or Rockstar is a non-party to this litigation that holds relevant documents and whose employees must be subpoenaed—also weighing against transfer.

Defendants do not seriously dispute that the former Nortel employees and current Rockstar employees identified by Constellation possess information relevant to these cases. "[V]enue is primarily a matter of convenience of litigants and witnesses," *Denver & R. G. W. R. Co. v. Bhd. of R. R. Trainmen*, 387 U.S. 556, 560 (1967), and regardless of the Rockstar employees current job titles or employment status, they live in and around EDTX and possess information relevant to this lawsuit. This is true irrespective of Constellation's corporate parentage and structure, and it weighs heavily against transfer.

Constellation was created because Rockstar held a core group of patents that it concluded would be relevant to service providers and not other customers. Given the many thousands of Nortel patents Rockstar inherited, some type of structure needed to be brought to bear.[7] This is not a debate about the legal relationship of Nortel, Rockstar and Constellation. It is a practical analysis of convenience under Section 1404(a). The long presence of Nortel and Rockstar in Eastern Texas explain exactly why convenience overwhelmingly favors EDTX.

IV. The Delaware Cases Have Not Progressed At All, Confirming That They Exist Merely As A Pretext For Transfer.

The present cases in EDTX have progressed significantly. The pretextual litigations in Delaware have not passed the starting gate. Indeed, after Constellation filed its motions to dismiss against the improper declaratory judgment claims, the Delaware plaintiffs filed repeated requests for extensions of time rather than respond while this transfer motion is pending. The Delaware cases have seen no Fed. R. Civ. P. Rule 26(f) conference, and no Rule 16 initial scheduling conference has been set. The marked difference in the status of the cases is important for two reasons: (a) it establishes that the Delaware plaintiffs are focused on creating a tactical advantage for TWC and Windstream, not on litigating an independent good faith dispute; (b) it establishes that transfer to Delaware will have very significant inefficiencies.

This Court has already set dates for initial disclosures under this Court's local patent rules and has already held a scheduling conference at which the Court set dates for a *Markman* hearing

[7] Defendants attempt to buttress their motion with Rockstar's statements in a case pending in N.D. Cal. Windstream Reply pp. 3-4. There, Rockstar noted that Nortel's conduct in a state that was not its headquarters (California) could not form a basis for ***personal jurisdiction*** over Rockstar in California. Windstream Reply Ex. 57 pp. 1, 10–11. Rockstar simply stated the truism that "[t]here is no rule of law or logic suggesting that any party who acquires any patent suddenly assumes every *jurisdictional* contact of the patent's prior owner." *Id.* p. 10 (emphasis added). ***Rockstar openly acknowledged that Nortel's presence and facilities and employees were relevant to a transfer analysis***. *Id.* p. 15.

and trial. Constellation has already complied with the EDTX local patent rules for initial infringement contention disclosures and document production, and the Defendants' must comply with their analogous disclosure and production duty next month. Dkt. No. 41.

The parties are actively negotiating a docket control and discovery order that will be filed on April 21, 2014. The Court also issued an example scheduling order for *all* other major case events and the parties have since agreed on dates for nearly all of them.

Further, this matter will progress expeditiously and efficiently in this district. For example, the parties have already all consented to proceeding before Magistrate Judge Payne—Constellation and TWC for all purposes, and Windstream for at least all pre-trial matters—such that "overlapping issues in these cases can be resolved consistently by the same judge" under the schedule that this Court has already set. Dkt. Nos. 53–54, 58 p. 1. In addition, all parties have also agreed to "present the Court with a single Discovery Order, single Protective Order, and single ESI Order (or present a single brief addressing disagreements of the parties regarding those orders) that would then apply in each case" in compliance with this Court's local practice, and to coordinate to "keep the cases aligned" under this Court's current schedule. Dkt. No. 58 p. 2. All of this coordination, all of these scheduled dates, and all of the parties' extensive efforts to prepare orders and make disclosures in compliance with this Court's local rules would be lost upon transfer. That result would be neither convenient nor consistent with the judicial economy principles that a proper transfer analysis requires.

CONCLUSION

Defendants can point to no concrete facts that favor transfer under a legally proper venue analysis. This suit should remain in the Eastern District of Texas, where infringing activity occurs, where numerous party and non-party witnesses are located, where the dispute started, and where the dispute belongs.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system on the 18th day of April, 2014, per Local Rule CV-5(a)(3).

/s/ Harry L. Gillam, Jr.
Harry L. Gillam, Jr.